UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

BARRETT GREEN, : Civil Action No.

Plaintiff, : PJM 13-1961

v. :

PRO FOOTBALL, INC., et al., : Greenbelt, Maryland

: Monday, November 25, 2013

Defendant. 10:15 A.M.

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TRANSCRIPT OF MOTION PROCEEDINGS
BEFORE THE HONORABLE PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

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COMPUTER-AIDED TRANSCRIPTION OF STENOTYPE NOTES

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P-R-O-C-E-E-D-I-N-G-S

THE DEPUTY CLERK: The matter now pending before this Court is Civil Number PJM 13-1961, Barrett Green versus Pro-Football, Inc., et al. The matter comes before the Court for a motions hearing.

THE COURT: All right. Counsel, identify yourselves for plaintiff and then for defendants.

MR. MILES: Good morning, Your Honor. Seth Miles, Mike McAllister and Bruce Plaxen for plaintiffs.

MR. FERGUSON: Morning, Your Honor. Robert Ferguson and Craig Ballew for the defendants. And also at counsel table with me is Eric Shaffer, General Counsel for The Washington Redskins, and Robert Forbes.

THE COURT: All right. We're going to call them the Washington Football team hear in this court. Have a local rule that tell us about the way words are used. No need to get into a big political issue with you on that. For now, that's what we'll call them.

All right. Let me address something first. I think the issue of preemption needs to be addressed first, because that's a jurisdictional issue, before we start talking about any state causes of action. So, however you've argued it, I think that's where we are in terms of the case. So, if you want to go forward. I don't know who is going to argue for the defendants.

I gather you're going to argue collectively for

defendants or are you going to split the argument. How are you going to do that?

MR. FERGUSON: I'm going to argue the Statute of Limitations issue and Mr. Ballew will argue the preemption issue.

THE COURT: All right. Let's start with the preemption issue.

MR. BALLEW: Thank you, Your Honor.

Your Honor, Craig Ballew on behalf of the defendants.

Your Honor, we're here on a series of issues. The issue that I will address is the question of Federal Preemption under Section 301 of the Labor Management Relations Act. It is an issue that frequently comes up when parties are dealing with disputes involving the Collective Bargaining Agreement.

This is a case in which there is a Collective Bargaining Agreement. Mr. Green signed a players' contract. He was a member of the union. There is a Collective Bargaining Agreement between the Management Council and the Players Association. They were his representatives. They negotiated the terms of that Collective Bargaining Agreement and it is what he operated under while he was an employee within the NFL.

When we look at the question of contractual or tort claims under state theories and whether they are preempted, we begin by reviewing the Supreme Court analytical framework. The Supreme Court has since the early 1960's been dealing with the

question of Section 301 Federal Preemption, the role of Federal Labor Law and the role of the arbitrators to decide Federal Labor Law.

In 1962, in the *Lucas Flour* case, they made it clear that a contract claim, which was predicated upon a Collective Bargaining Agreement could not be brought under state law. They expanded on that in the early 80's through the early 90's, beginning with the *Allis-Chalmers v. Lueck* case. That is a case that involved Mr. Lueck. He had what we call a non-occupational injury to his back.

Apparently, he was visiting a pig roast and he carried the pig to the pig roast. He injured his back. He worked for an employer who had disability benefits. Fortunately for him, they included non-occupational benefits. They were a benefit under the terms of the Collective Bargaining Agreement.

He applied for and received benefits. His assertion was that periodically his employer would call upon the carrier to cut off those benefits improperly. He did not file a grievance. He filed a state suit in Wisconsin courts arguing that the disability claim and the administration of the claim was not being dealt with in good faith and fairly.

That is an issue that the Wisconsin Courts addressed. Their conclusion was, it was not preempted. When the issue went to the Supreme Court, Judge Blackmun, Justice Blackmun reviewed the prior cases and he framed the discussion of this tort issue

within the parameters of Section 301. He made it clear, questions relating to what the parties to a labor agreement agreed and what legal consequences were intended to flow from breaches of that agreement must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

He went on to note that the Court's analysis needed to focus on whether evaluation of that tort claim was inextricably intertwined with consideration of the terms of the labor contract. If the state court law purports to define the meaning of the contractual relationship, he indicated it was preempted.

He went on to note that the mistake made by the Wisconsin Courts was first making the assumption that because something was not expressly laid out in the Collective Bargaining Agreement, that therefore they had the right to determine whether implicitly an obligation existed under that document. That was the analysis of the Court, the Supreme Court of Wisconsin. That is what the Supreme Court of the United States said was flawed.

In looking at this, he also noted that the underlying State Supreme Court analysis was harmful because it took away under the terms of the Collective Bargaining Agreement the federal right of the parties to discernment who would decide their contract disputes. That is at the core of protecting the

role of the arbitrator under Federal Labor Law, specifically under Section 301.

A few years later in the *Rawson* decision, a case involving a tragic fire in a mine, claims were brought by deceased minor survivors arguing that in this case the union had violated certain standards. It was a wrongful death action. Justice White reviewed the decision of *Allis-Chalmers*, again restated that state law action is preempted if the duty to the employee of which the tort is a violation is created by the Collective Bargaining Agreement and without existence independent of the agreement.

In that case, the state of Idaho had determined that the wrongful death claim predicated on a duty to inspect the mine was independent of the Collective Bargaining Agreement. Justice White found that to be incorrect; that indeed, the union's obligation to conduct an inspection was a product of the Collective Bargaining Agreement. And, therefore, if there was a violation, one had to look to the Collective Bargaining Agreement to make that determination. Remedies available for that violation would be under federal law, not under state law.

The Fourth Circuit has in several decisions taken and applied these standards. The parties have cited to the *McCormick* decision, an AT&T case involving an individual who was let go, his locker was opened, his materials were removed, his personal belongings were put in the trash.

He brought, again, a claim under state, Virginia state law, not a grievance under the Collective Bargaining Agreement, even though he was a union member. The case was removed to federal court, preemption argument was made, summary judgment was granted. And when the Fourth Circuit looked at the issue for purposes of analyzing preemption, they said that the question is whether resolution of the cause of action requires interpretation of a Collective Bargaining Agreement.

Rightness or wrongness of cleaning out that locker was not committed to the common law of the tort, but to the legal arrangements of the Collective Bargaining Agreement, the agreement between the parties.

It went on to note, again, management's rights and obligations aren't always expressly delineated in a contract. And it referred back to the *Warriors versus Golf Navigation*, Supreme Court decision of 1960, noting that a CVA is more than a contract. It's a generalized code of conduct and it governs many cases, including those that the draftsmen might not have considered at the time they were drafting.

More recently in 1993, the Fourth Circuit looked at the issue again in *Jackson versus Kimel*. Again, AT&T was one of the defendants. This was a case in which an individual claimed that there was coerced sex in return for job benefits. AT&T was ultimately dismissed, because the underlying claims were found to be insufficient.

The Fourth Circuit looked at the claim against Mr. Kimel, however, and found that it was not insufficient and that it was not preempted. In reaching that conclusion, they looked at the fact that coerced sex in exchange for benefits was something that was impermissible under Title VII of the Civil Rights Act of 1964; was impermissible under the public policy of North Carolina. And as the Fourth Circuit noted, it was possibly also a violation of state criminal law. They concluded that they did not need to interpret the Collective Bargaining Agreement in order to determine if the duty to refrain from certain conduct existed.

When we turn from those cases and we look at the claims that the plaintiff in this case is making, we begin with the complaint. It is clear from a review of the complaint what the plaintiff is alleging.

In Count One, there is a claim against Defendant Royal for battery. Paragraph 49, he makes it clear, plaintiff in no way consented to described contact by Defendant Royal, which was outside the rules of the game. That's the language of the complaint.

Count Two, paragraph 58, players were encouraged and even compensated for playing outside the rules of the game.

Count Three, negligence. Paragraph 65, Royal had a duty to play the game of football in a manner that was consistent with the rules as set forth by the NFL.

And in paragraph 68, Defendant Royal breached his duty to plaintiff by blocking plaintiff in violation of the applicable NFL rules.

Count Four, Five and Six go on to make the same references to the existence of a duty and violations of the rules, conduct outside the rules of the game. When we look at this complaint, we see it clearly asserts that there was a duty, a duty to act and a duty to refrain from acting in a certain manner. That is expressly tied to the NFL's rules. These violations are what the complaint says reflect the defendant's breaches of the duties, the violations of the rules or the breaches of the duty.

THE COURT: Well, is the duty here the duty to abide by the rules or is there -- well, what does it say about, and assume it's true for present purposes, a football organization directing somebody to go out and try to cripple somebody else? Is there a duty not to do that? Is that in the rules?

MR. BALLEW: That would be a violation of the NFL rules.

THE COURT: Well, is it? Now, the issue is, can a team pay a bounty to a player to the extent that the player can deliberately injure another player as opposed to simply going out and playing hard or even playing dirty?

MR. BALLEW: When the plaintiff tries to characterize this as a bounty system that is somehow an apparently

inappropriate action, what they're doing is they're really saying, this is a violation of our existing NFL rules. And those NFL rules are expressly referenced in both the constitution and bylaws. They are also a part of the player's contract and they are a part of the Collective Bargaining Agreement, which the players contract is a part of.

This is not a situation where we can look outside the terms of the relationship on the field and in this institution to determine the social boundaries. The effort is being made by the plaintiff to run away from his own complaint. And part of that argument is that this is somehow outside the rules, outside the Collective Bargaining Agreement and fitting within this narrow exception like the coerced sex for job --

THE COURT: I don't think the plaintiff is saying, it's outside the rules in the sense that the rules may not provide a standard of measurement. But are you saying, ipso facto that makes the Collective Bargaining Agreement applicable just because there a reference to the rules?

MR. BALLEW: No, the cases recognize there has to be something more than a tangential reference to the Collective Bargaining Agreement. Now, the Supreme Court and the Fourth Circuit have made that clear. So we're not here saying that simply because there is a Collective Bargaining Agreement, therefore there must be preemption.

But when you look at this complaint and what is being

argued, the source of the duties is the obligations under the rules, the contract, the Collective Bargaining Agreement. And the arguments being made, I can, I can separate from that and say that there is a duty that this player and this team owe to everyone in the world. And that, I would submit, is not accurate.

What we have to look at are the standards applicable when players take the field and play football in the NFL. There is physical contact. It is violent physical contact. The rules define when that violent physical contact is within the rules and outside the rules. The premise that we can put those rules and the contract aside, and go to outside tort standards to determine duty would suggest that every time there is contact on the field, we have the potential for a claim being made separate from the Collective Bargaining Agreement.

THE COURT: Well, go back to my question. Is the issue that the block was illegal or is the issue that a bounty was paid to try and deliberately injure somebody? I mean, I think that's the distinction the plaintiff is trying to make here. If this were just an illegal block under the rules, you're probably right. I mean, there's not much to talk about.

But he's saying, late in the game I discovered that -- if in fact it's true. I don't know at this point -- that the team was actually playing players to go out and try and cripple other players. That's what the essence of the claim is here;

not that a rough, injurious block was -- well, that's part of it, obviously, but that's not the core. At least, that's the way I read the plaintiff's complaint.

MR. BALLEW: And I would submit that, again, when he makes that argument, what he's trying to do is say that something that is predicated on a violation or a non-violation of rules can be analyzed separate from those rules in a different context.

THE COURT: Let me ask you a question. Suppose on the way into the stadium on the day of the game one player walked over and punched another player in the face, and knocked him cold and created injury. Would that be covered by your analysis?

MR. FERGUSON: The NFL's constitution and bylaws have very specific language and it's attached as an exhibit. And let me just find that language for you.

First of all, in Section 9.3 of the --

THE COURT: Collective Bargaining Agreement or --

MR. FERGUSON: This is the constitution and bylaws. Section 9.3, there is a reference to the fact that every contract with an employee of the league or a club therein shall contain a clause wherein the employee agrees to abide and be legally bound by the constitution and bylaws, and the rules and regulations of the league, as well as by the decisions of the commissioner which decision shall be final, conclusive and

unappealable.

In addition to that, in Section 8.3, the jurisdiction of the commissioner is laid out in Section 8.3. And in 8.3(C), any dispute between or among players, coaches and/or other employees of any member club or clubs of the league, other than disputes unrelated to and outside the course and scope of employment of such disputants within the league.

So to your question or to begin, the facts of this case are clearly disputes in the course and scope of employment. They're on the field. They are playing football. There is contact.

Your hypothetical speaks to what may or may not be inside or outside the scope of employment of the disputants. By your description, they're in the stadium, the game hasn't started.

THE COURT: Well, let's change the hypothetical. He pulls out a knife during the game and stabs somebody on the other team. Games on, field is in play, what's about that? Can a player -- would that be within the Collective Bargaining Agreement?

MR. FERGUSON: Obviously, that's not the situation we're dealing with here.

THE COURT: Well, that's your argument. The question is, is it more like one rather than the other.

MR. FERGUSON: I would submit to you that that's more

like the *Brown* case where the referee threw the flag, and the analysis of the Court, which reached the conclusion it was not preempted, was that that referee owed that same duty in throwing that flag to players and fans in the stadium. Therefore, they didn't have to look to the terms of the Collective Bargaining Agreement.

In your hypothetical, that same argument could presumably be made. Within our facts, what we have are two players engaged in contact. There is a crack block and there is a penalty. And the rules speak to that type of violation. The rules, again, are something employees through their contract have agreed to abide by. Their contract is an appendix to the Collective Bargaining Agreement, and the parties have a document that specifically expresses what is covered by the grievance arbitration procedure. It is an extremely broad clause. The plaintiffs try and narrow it.

Article IX, Section 1, this is -- although we are dealing with unique employees, we are not dealing with a unique Collective Bargaining Agreement. This is a classic grievance arbitration provision and it begins by defining what is a grievance. And it says, if it's a grievance, it will be resolved exclusively in accordance with the procedures set forth in this article, accept where another method of dispute resolution is set forth elsewhere in the agreement.

What is the definition? Any dispute, any dispute

arising after the execution of this agreement that involves interpretation of, application of or compliance with any provision of the agreement, the NFL player contract or any applicable provision of the NFL constitution and bylaws pertaining to terms and conditions of employment of NFL players.

So, when we look at a rule violation and we look at this grievance clause, we see any dispute, interpretation, application, compliance. We have a rule here, a contract that speaks to the rules here and we have a Collective Bargaining Agreement that speaks to it.

THE COURT: Do we agree that with regard to the state causes of action that Maryland law applies?

MR. FERGUSON: I'm sorry. I didn't hear.

THE COURT: Do we agree that with regard to the state cause of action that Maryland law applies, assuming we're setting aside for a moment the Fair Labor Management Act, Federal Labor Relations Act.

MR. FERGUSON: State laws of Maryland versus --

THE COURT: Anywhere else? It's Maryland law, right? The state causes of action, is it Maryland law we're talking about?

MR. FERGUSON: Plaintiff, as I understand, has framed its claims based on the state of Maryland tort claims.

THE COURT: Let me put the question to you this way: Would it be legal under Maryland law to have any kind of a

clause that gave, that made someone waive their right to a jury trial, put absolute authority to determine to some arbitrator without being able to go to court? That is, if the provision would say, even if you are deliberately injured in the course of your practice by someone, you're waiving any right to file any claim, you must go through a grievance proceeding. Would that be legal under Maryland law?

MR. FERGUSON: Let me answer that in beginning by making clear the nature of the relationship.

Mr. Green was a member of the union. The union had a contract with the association. So can a union enter into an agreement which requires individuals with their claims to bring those claims under arbitration versus under a state --

THE COURT: Is it just under arbitration or are you waiving any -- you just read some exclusive language that it's solely and exclusively the commissioner who can decide this issue, that there's no recourse beyond that. That's what you've said.

MR. FERGUSON: And that is at the essence of why since the 1960's the Supreme Court has been recognizing and protecting the role of the arbitrator, because prior to those decisions there was an antithesis on part of some courts to recognize the role of an arbitrator to make these decisions.

And in the early 1960's the Supreme Court recognized, no, we need to recognize under the Federal Labor Law it is the

arbitrator. We cannot have state courts addressing these issues. We need to have the arbitrators, because this law has given these parties the right to agree that we will have our disputes addressed by this person.

THE COURT: And you're saying -- this may be true under Maryland law. I don't know whether you would say it's true under federal law, but under Maryland law you can't waive away your right to sue when there's gross negligence, for example, in a landlord tenant case. It's just illegal, that clause, even though landlords have tried to write it into the contracts, the courts in Maryland say, it can't be done. You can't excuse your own gross negligence or by a step forward your intention to injure someone. And I ask whether that has been applied in any Collective Bargaining Agreement context under the, to get this right, the Federal Labor Management Relations Act?

MR. FERGUSON: It has. And I have to apologize, but I we can get you the citation. But a few years ago the Supreme Court addressed the issue of whether or not an individual under the age discrimination employment act had a right to pursue that claim notwithstanding the existence of a Collective Bargaining Agreement.

That Collective Bargaining Agreement said, if an individual who is a member of the union has this type of a claim, they must bring it through arbitration. The argument was

made that that was void as against public policy. That Title VII in the ADEA recognize the independent right to bring that cause of action, including bringing it to a jury.

The Supreme Court looked at that issue, recognized we have Title VII principles on one hand, but that we had to also take into consideration the National Labor Relations Act and Section 301. And the determination was made in that case that, in fact, the union had the right to enter into that agreement and the employee was bound by that agreement, which required that that type of a dispute not go to a jury, but go to an arbitrator. And I apologize, I don't have it at the top of my head.

THE COURT: I'm not sure it disposes of the intentional injury issue, but it's an interesting argument.

MR. BALLEW: As I said, this begins and I would submit really ends with the complaint, and the discussion of the duties and where those duties come from, because when you take the Supreme Court decisions, when you take the Fourth Circuit decisions, you recognize this isn't tangentially tied. This is going directly to the rules. The rules are at the core of the relationship between the parties. When they're on the field, what is permissible, what is not permissible.

And the suggestion that we should, as the plaintiff has done since hearing the Motion for Summary Judgment, ignore those rules is something that we would submit should not be

accepted by the Court.

Again, the response of the plaintiff in this situation when the motion was filed was to begin by running away from his own allegations. At pages 9 and 10, suddenly these rules, suddenly the source of the duty become something that is a mere recital of normal conduct within the league.

That argument can't withstand review. These allegations decisively confirm that the rules, the contract are inextricably intertwined with this dispute. Mr. Green cannot avoid the consequence of these pleading admissions.

He cites to cases that are distinguishable. We mentioned one, *Brown*. *Hendy*, the other decision involved the doctor's failure to treat the player's condition properly. Those are different and clearly they involve situations where the duty that was owed was owed to everyone. A doctor's duty to treat someone properly is not a product of the Collective Bargaining Agreement. That's the analysis that those courts reached.

The *Hackbart* decision which they cite, first of all, preceded all of the Supreme Court analysis. It's a trial court decision from 1977. So, you know, years later we get *Allis-Chalmers*, we get *Rawson*, we have other decisions. I would submit to you that the *Hackbart* decision is wrong for a number of reasons, including the fact that it ignores the Supreme Court admonition against making the assumption that because something

is not expressly in the agreement, that therefore it isn't explicitly an obligation.

Again, that is where, according to the *Lueck* decision, the Wisconsin Court got it wrong. That is where, according to *Rawson*, the Idaho Courts got it wrong.

This is not like a coerced sex for job benefits or false imprisonment under threats of shaming by walking someone past peers handcuffed. The appropriate standard for blocking opposing players is not a matter of intrinsic moral import. The standards on the field cannot be found by looking to public policy. It is a violent game. That's why there are rules.

THE COURT: You keep talking about that. I haven't heard anything about the bounty. I mean, I gave you the benefit of the argument for a bit saying, sure, that's rough play. But the issue here, isn't it, is that allegedly the team was paying bonuses to people to deliberately injure, not to play dirty. I mean, some players play dirty, we know that, but they were being paid to play dirty. This is the allegation.

MR. FERGUSON: It's the allegation, which of course we've noted we --

THE COURT: Well, of course, I know you dispute it, but that's really where I'm -- I think we're looking at that issue now that, yes, sure, the rules require you to only have certain kinds of blocks that you put on. You don't have this crack back block that's illegal and so on. And it was called, I

guess, at the time, was it not, that this was an illegal act and it was penalized?

MR. BALLEW: Yes.

THE COURT: Well, all right. I want to see what plaintiff has to say about that and I'll give you a chance to rejoin then, all right.

MR. BALLEW: Thank you.

THE COURT: Mr. Miles then, yeah.

MR. MILES: Thank you, Your Honor.

Your Honor, the preemption argument is really based on a fundamental misunderstanding of the gravamen of the complaint. As I think the Court pointed out, the gravamen of the complaint is that, in fact, there was this Bounty Program, which was a program designed to pay players to intentionally injure other players. And because that, in fact, is the gravamen of the complaint, this complaint comes outside what the CBA says or even could say.

And the answer, quite frankly, to both their hypotheticals, whether or not in one instance as a player punched another player on the way into the game or if a player took a knife out during the middle of the game and stabbed someone, which is somewhat analogous to what we have here, both those would be outside of preemption for a very simple reason.

And the reason comes to us from the *Brown* case, which was cited in the Southern District of New York, 2002. And I'm

going to read from what *Brown* says. *Brown* says, and I quote, Courts of Appeals have frequently held that claims of intentional torts like assault or battery, parens, that's what we've alleged here, brought by employees covered by CBAs against fellow employees are not preempted by Federal Labor Law.

It continues, "Thus, if Brown claimed that Triplett had intentionally thrown the flag at him, the resulting battery claim would surely survived any assertion of federal preemption." So what the *Brown* Court is saying, citing other -- citing some Circuit Courts of Appeal, is that an intentional tort which is what the Bounty Program is alleged to be in our complaint, simply comes outside the CBA.

And it comes outside the CBA irrespective of any language for a very simple reason. And that comes from this Court's opinion in the *Smith v. Giant Food* case. It's Tab Number 12 in our binder. What the *Smith* case says and the *Smith* case is concerning a false imprisonment allegation. It says, Maryland Tort Law and Criminal Law both prescribe false imprisonment.

Maryland law clearly reflects the public policy against physical detention of an individual without legal justification and makes the conduct a matter of intrinsic moral support. It continues on and says, citing the Supreme Court opinion is *Lueck* that, therefore, Section 301 does not grant the parties to a Collective Bargaining Agreement the ability to

contract for what is illegal under state law.

THE COURT: Well, that's what I was driving at.

MR. MILES: And there is no question, it is illegal under state law to commit a battery. It would be illegal under state law to have a Bounty Program that payed players to commit battery for the purpose of injuring opponents. Because the gravamen of the complaint is that intentional tort, which corresponds with criminal conduct, the CBA in this case, even if it tried to cover these claims and I'll argue that it doesn't, but even if it did, it would fall outside of the scope of what could conceivably be preempted because of the type of allegations in this complaint.

The *Jackson* case, which is Tab 9, Fourth Circuit case from 1993, makes that again very clear. Quoting from the *Jackson* case, it says, in this case, interpretation of the Collective Bargaining Agreement is not necessary to determine whether *Kimel* owed a duty to refrain from the alleged conduct. The Collective Bargaining Agreement could not authorize his alleged behavior.

The NFL Collective Bargaining Agreement could not authorize a Bounty Program designed for the purpose of injuring other players. It is illegal conduct. It is an intentional tort. And, therefore, irrespective of the language in it, this claim comes outside of preemption.

THE COURT: Do you concede that if there were no

Bounty Program, you'd have no cause of action?

MR. MILES: I concede that if there were no intentional tort --

THE COURT: Well, let's assume. I mean, wasn't the plaintiff arguing at the time that Royal, in fact, did intend to injure him, the player did. But if there were no Bounty Program and leaving aside even limitations for a moment, would you concede that a cause of action had been stated if you could establish that an opposing player really intended to hurt you? I mean, that happens all the time, doesn't it?

MR. MILES: No, Judge, I don't think -- certainly, there are hard hits. Certainly there are hits inside and outside the rules of the game. But to claim, as we have alleged, that a single player setting aside the Bounty Program, for whatever motivation intentionally tried to injure another player, hit him with the intent to injure, that is not only an intentional tort, it is violation of the criminal law. And, therefore, under preemption analysis and under the *Smith* case and the *Jackson* case, that would fall outside of the CBA.

THE COURT: Well, stop there for a moment. I mean, think about that. How many -- wouldn't it be in litigation all the time with players suing other players because he speared me deliberately. Boy, that seems to go on in every game. I mean, that's an intentional tort. I'm not merely trying to put the man down with the ball, I'm trying to hurt him.

MR. MILES: Well, Judge, I think what separates it in kind and degree is what you saw in the *Hackbart* case. So, clearly, in the game of football there are hard hits, there are legal hits, there are illegal hits. But in the *Hackbart* case that went up to the Tenth Circuit, what you had was a hit that was maliciously designed to injure. Not to cause a fumble, not to set a player out for a play or two; a hit that was maliciously designed to injure.

And what that does is it takes us outside of our typical tort civil law system and brings us into a very different arena where intentional torts in criminal law, in fact, prescribed the conduct. And by doing that --

Now, there can be other arguments and there were in *Hackbart* and there are, I'm sure, in this case about assumption of the risk and things like that. But that mere fact of the malicious intent, the mens rea to injure takes it outside of the realm of the Collective Bargaining Agreement, takes it outside of the realm of anything that can be contracted to by the NFL and the --

THE COURT: Let me ask you and I pose it to defense counsel as well whether there have ever been any cases where a player made a complaint within the Collective Bargaining Agreement that another player deliberately sought to injure him? That is, it was ever brought to a grievance within that, within that system.

I mean, I wonder. It seems to me a lot of people just -- the players pretty much assume that it's part of the game.

MR. MILES: Judge, not only am I unaware of any such grievance being brought, but in fact, I'm unaware of any provision in the CBA cited to by defendants or anyone else that would permit under the CBA or any rules of the NFL one player to issue a grievance against another player under that contractural provision.

THE COURT: You say, a player couldn't file a grievance against another player?

MR. MILES: I've seen no indication in anything pled that they could do so under the Collective Bargaining Agreement here.

THE COURT: Well, could they file it against another team?

MR. MILES: Not that I've seen. The Collective Bargaining Agreement -- and this is what the *Hackbart* speaks to, one of the things the District Court speaks to. District Court says in the *Hackbart* case, there is no provision in the CBA for disputes between players of different teams.

Now, in this case, the defendants have cited to numerous different rules and regulations and bylaws. What they have failed to cite -- and again, we're assuming the CBA applies and we believe it does not, but what they fail to cite is a

single procedure in any of the documents they've provided this Court that would permit Mr. Green to file a grievance against Mr. Royal or against the defendant football team for purposes of an intentional hit to injure him and seek any sort of recovery or compensation.

There is no such provision within the CBA that's been brought to our attention or this Court's attention in the pleadings. And the reason is, quite frankly, it doesn't appear to exist.

THE COURT: Well, the argument was made that, at least citation to a case that it doesn't have to be explicit in the agreement. It can be implicit. And the question is, is it implicit even?

MR. MILES: Not only is it neither explicit or implicit, they have not cited to a provision, which by my reading would allow a player to even institute that procedure to begin with. So, there's nothing within these documents that they have cited that says, Mr. Green had the ability at any time to bring this specific grievance in any way within the four corners of the Collective Bargaining Agreement.

They've cited to a single broad interpretation of the commissioner's overall authority, but no ability by a player to bring a grievance against another player or against another team. And in fact, that was one of the bases for the *Hackbart* opinion.

The argument that the defendants make concerning the rules and regulations that they allege we cited in the complaint, which in fact we did not cite specific rules and regulations. What we cited are industry standards. And industry standards, as I think the Court discussed with defense counsel, provide the backdrop can be evidence of negligence or battery, or any other civil cause of action. But the mere citation of them, even had we cited them verbatim, which we did not, would not cause this cause of action to be preempted.

The very same argument was made by the NFL in the *Brown* case. And what the *Brown* case determined, the Southern District of New York, is that a plaintiff arguing a member of a particular trade or profession behaved negligently in carrying out his duties may appropriately use as evidence of negligence manuals, regulations or other materials defining the reasonable and expected standard of professional practice within that occupation. Nothing more was done here.

Again, the arguments by the defendants is based on a fundamental misunderstanding of the gravamen of the complaint. This is not a negligence complaint saying that the defendants should be liable because the employee or their employee breached NFL Rule 1.7 Sub-Section 5, Sub Sub-Section A. That's not the gravamen of the complaint. It's a Bounty Program to intentionally injure another player for the purpose of benefiting both the defendants.

The *Brown* case continues and, again, this is assuming that not only are we within the grounds of the CBA and as I've argued repeatedly, we're not; not only were there allegations of -- and in the *Brown* case they were far more specific, of specific NFL rules being violated.

What the *Brown* case eventually says, after again looking at the document cited by the NFL, the same document cited to this Court to try and create an argument that, in fact, any interpretation of these rules; in fact, any mention of these rules causes complete and total preemption.

What the *Brown* Court says is, again assuming the CBA applies, assuming there's reliance upon these rules, which is not our case, the *Brown* Court says, even if the references in the plaintiff's complaint to the content of specific NFL rules or to various instruction manuals for referees are seen not merely as evidence of professional standards, pause, which is what we have in this case, but as sources that define the ordinary nature and risk of football and, thus, define the duties of care owed to plaintiffs, these documents are not part of the CBA.

As the CBA incorporates by reference, at most, only the NFL constitution and its bylaws, and the terms of the constitution and the bylaws need not be interpretated [sic] in adjudicating plaintiff's claims, there is no need to interpret the CBA and, therefore, there is no grievance procedure that

applies, and the no suit and the no grievance parts of the CBA that are cited to by the defendants are inapplicable.

So, what *Brown* is saying is, let's assume the CBA applies to intentional torts. Let's assume that the citations in the plaintiff's complaint are actually directly the cause of action of negligence, are based directly upon breach of those particular standards. Let's assume both those things. Then and even then, you still don't have preemption because those NFL rules that they are relying upon so heavily, when you actually examine the totality of the documents, are not even incorporated into the CBA. They're separate and apart from the CBA. So even when you get to that level of granular detail, they're still not applicable, they still don't cause preemption.

And, therefore, the *Brown* case continues discussing specifically the no-suit clause. As demonstrated above, while the issue in this case could involve the NFL rules -- again, that was the case where the referee threw the penalty flag that struck the player in the eye. So in that case, the citation to the rules was far more significant and the causes of action were far more dependent upon it than they are in this case -- which include a provision relating to the use of penalty flags, again very specific, or the various official manuals, nothing in the suit turns on the interpretation or enforcement of, or in any way relates to the constitution and bylaws which relate to the organization of the league and not to the rules of play. Thus,

by its own terms, the no-suit provision has nothing to do with this lawsuit.

Continuing, the arbitration clause cited by the NFL provides no greater help to its position. Why? Because the cited arbitration clause only applies to disputes growing out of CBA itself, the NFL player contract or the constitution and bylaws. It does not purport to require arbitration of what would otherwise be tort actions brought by players.

So, for a number of levels from the very initial analysis, we are not a part of the CBA because the bounty program is an intentional tort and the CBA could not prohibit or could not cover that conduct, even if it so chose.

Going further into the CBA itself, it simply does not even incorporate these rules the NFL, that the defendants in this case allege are incorporated and provide the basis for preemption.

And in fact, the rules themselves would not be applicable in this particular case, because what they are is citations by the plaintiff as is standard in almost every tort suit in which they are applicable as evidence of breaches, but they are not the gravamen of the complaint.

So for each of those reasons individually and certainly cumulatively, preemption simply not apply in this case.

THE COURT: All right. Want to reply, counsel?

MR. BALLEW: You just heard a discussion of the grievance procedure. And the assertion is that the rules are not subject to the grievance procedure. Let's walk through some documents to address that issue.

First of all, again, Constitution and Bylaws, Section 9.32, every contract with any employee of the league or of a club therein shall contain a clause wherein the employee agrees to abide and be legally bound by the constitution and bylaws, and the rules and regulations of the league as well as by the decisions of the commissioner, which decision shall be final, conclusive and unappealable.

THE COURT: You're saying that would allow the commissioner to just decide any question he might decide.

MR. BALLEW: I'm saying that the parties have agreed that the rules have to be a part of the contract and employees, such as the plaintiff, have to agree that the commissioner will address and interpret disputes under those rules, yes.

And Section 8.3, this is a dispute and the commissioner has full, complete and final jurisdiction and authority to arbitrate any disputes between or among players, coaches and/or other employees of any member club or clubs of the league, other than disputes unrelated to and outside the course and scope of the employment of such disputants within the league.

The contract in Section 14 speaks to rules, club and

league rules. The grievance procedure says, any dispute that involves interpretation, application or compliance with the agreement, the contract or the constitution and bylaws is subject to this exclusive procedure.

The plaintiffs try and make the argument that this is not something that involves a term and condition of employment and therefore is not subject to this. We disagree. Term and condition of employment is a term applied under the National Labor Relations Act. It is applicable in many contexts.

When a union files a petition to have an election, there is a period of time. And after that election, if they are successful, there is a period of time in which the employer is barred from making any changes in terms and conditions of employment.

Many times employers despite those rules will make changes because they think something is not a term and condition of employment. But the National Labor Relations Board has for 75 years been interpreting that term and recognizes it is extremely broad; wages, benefits, schedules and many other things.

There is a Board decision when an employer had a practice of handing out Thanksgiving Day turkeys. The union showed up, filed the petition, the employer stopped handing out Thanksgiving Day turkeys. The National Labor Relations Board said, your practice of handing out those turkeys is a term and

condition of employment. You've changed it, you've changed it unilaterally, and as a result of that, this is a violation of the National Labor Relations Act. The National Labor Relations Act is very broad when it comes to the concept of a term and condition of employment.

So we have clear contractual language by the union that says, these must be addressed. And then we have the complaint in which the party who is bringing this case repeatedly references the duties and the rules. And in this situation, I'll refer to the *Brown* case in a second, but the Supreme Court *Allis-Chalmers* decision would say, the question of what the Washington football team and the Defendant Royal, parties to a labor agreement agreed to and what legal consequences were intended to flow from breaches must be resolved per Federal Law under Section 301.

The *Rawson* decision would say, what the Washington football team and Defendant Royal, if they breached the duty, it was a duty that arose out of the Collective Bargaining Agreement rules, and constitution and bylaws. Therefore, it is preempted.

Under the Fourth Circuit analysis, the question would be, is there a duty that exists? What is the nature and scope of that duty? You can't answer that question without getting to the rules. And when you get to the rules, you get to the obligation to address the parameters of those rules through the grievance arbitration process.

Brown --

THE COURT: Let me just follow you, though, for a minute. Through the grievance arbitration process from which there is no appeal, you said, only to the commissioner. It's not a normal arbitration, even in the sense that you can what, challenge even the competency of the arbitrator, anything that you can do under the Federal Arbitration Act. But your reading is that once the commissioner says, that's it, there's no appeal. The case should be dismissed if anybody files it. Is that correct? Maybe I'm misunderstanding.

MR. BALLEW: No, let me clarify. There are provisions in this Collective Bargaining Agreement that say arbitrator's will address certain issues, and there are other provisions that say the commissioner will address and resolve certain issues. When it comes to Article IV, we are talking about the arbitrators that are designated by the Player's Association and Management Council. If that arbitrator makes a decision, then under the Federal Arbitration Act and the Maryland Arbitration Act, there are very limited opportunities for anyone to seek an appeal.

The use of arbitration has many benefits and it has certain detriments. The reality is that when parties in a Collective Bargaining Agreement enter into a relationship and say, I'm going to have this arbitrator decide this issue, then they are foregoing certain options that otherwise exist in civil

litigation.

THE COURT: But is there internal appeal, internal appeal to the commissioner from the arbitrator's decision?

MR. BALLEW: I do not recall seeing an internal appeals --

THE COURT: That's what I was, perhaps, averting to. I don't know that there is.

MR. BALLEW: Yes, but the decisions of an arbitrator under this contract would be subject to the Federal Arbitration Act, so there would be certain opportunities to take appeals, but they are very limited. But that's because, again, under our Federal Section 301 labor laws, the parties have entered into an agreement that says, this process will rule. It will be determined by the arbitrator.

And the Supreme Court cases since the 1960's have repeatedly recognized, we can't have state courts coming in and trying to take over that function, and creating a situation in which state courts are giving different interpretations of Collective Bargaining Agreements.

The parties agreed this arbitrator or these arbitrators will rule. That is where the decision should be made. And if we allow people to take something that is a contract dispute and turn it into a tort claim, and engage in artful pleading, we are undermining the federal labor principles of Section 301.

Brown is very different. It was a different collective bargain situation. *Brown* involved the referee. This involves two players. Section 9.3 expressly recognizes rules apply, and 8.3 of the constitution recognizes the commissioner deals with disputes, including disputes among players.

The suggestion was made that there's not been citation to any basis for Mr. Green to bring a claim under the grievance process. I would disagree. If the Players Association in conjunction with or if Mr. Green separate from the association wanted to pursue the issue, he would pursue it under Article IV of the Collective Bargaining Agreement.

The question that he would then present to the arbitrator is whether or not he has articulated a purported failure to properly interpret, apply or comply with the agreement, with the NFL player contract or with the provisions of the NFL's constitution and bylaws.

There is a mechanism. That mechanism should have resulted in a grievance no later than February, 2005. We're now in 2013. But that was something he could have pursued. And in that situation, it would have been the arbitrator under the contract, the parties had agreed to, who would make the decision. Does he have a claim? Can he bring this claim?

This is what we refer to in labor law as grist for the arbitral mill; a process for resolving disputes in industry that recognizes the role of the arbitrator to make these decisions.

Hackbart was a different Collective Bargaining Agreement. *Hackbart* was pre-Supreme Court analysis. *Hackbart* is not good law. The Court should look to *Allis-Chalmers*, *Rawson* and the *McCormick* decision to determine, how do I analyze these documents and these claims. And again, this is a situation where the argument is being made that these are industry standards.

Industry standards is a term that is used in many context, in many industries. You can't determine industry standards unless you speak to the particular industry. In this industry, it's the rules that set the industry standard. That's why they cited it in their complaint. It was only when they realized the implications of their admission in pleading that they began to run away from that assertion, but they can't.

This is not a situation in which Mr. Royal owes a general duty to everyone in society to, as they said in paragraph 65, play the game of football in a manner that was consistent with the rule set forth by the NFL.

THE COURT: Well, that's why I wonder whether there's a difference between the allegation against Royal and the allegation against the football team. That is, if the gravamen is the payment of the bounty, does that create a different duty? Is there a duty that the club has that, perhaps, the individual player doesn't or maybe -- I don't know.

You argue something like a conspiracy, but I'm asking

that as well, because you say Mr. Royal owed a duty, et cetera. But again, to come back to the gravamen, as they cast it, of their complaint, it's the bounty system.

MR. BALLEW: The bounty system and the obligations of the club are covered by the same rules, constitution and Collective Bargaining Agreement. So if there is a duty in this situation where we have allegations that grow out of conduct under a Collective Bargaining Agreement, then you have to look to the Collective Bargaining Agreement to determine, again, as the Supreme Court has recognized, is there a duty? What is the scope of the duty?

THE COURT: All right. Final word, because I want to get on to limitations.

Mr. Miles, anything further?

MR. MILES: Judge, I don't have anything further.

THE COURT: All right, Mr. Ferguson.

MR. FERGUSON: Good morning, Your Honor.

I'm going to address the Statute of Limitations argument. And this Court has the jurisdiction to determine the substantive issues raised by the defendants in their Statute of Limitations defense in the *Childers versus Chesapeake Potomac Telephone Company* case. The Fourth Circuit says that, although -- before the Court is a question of whether or not preemption should or should not apply. If there are substantive defenses raised, the Court may nevertheless in the interest of

judicial economy address the substantive defenses raised by the defendants.

It is our position that the claim by Plaintiff Green in this case is barred by the Statute of Limitations, because it was brought more than three years after the incident occurred. Plaintiff attempts to cast this claim in the discovery, in a manner in which the discovery rule would apply and we submit that the discovery rule does not apply here.

THE COURT: Before you go any further with this, I gather, though, that with regard to the preemption claim, the argument would be that also, essentially, the failure to exhaust administrative remedies, which is comparable to a limitations claim would result in dismissal of the case, just so we put a fine point on that.

MR. FERGUSON: That is correct.

THE COURT: All right.

MR. FERGUSON: And there's also the six months Statute of Limitations under the Labor Management Relations Act.

THE COURT: All right, very good.

MR. FERGUSON: But as far as the state law claims are concerned, the Statute of Limitations applies.

Mr. Green in his complaint alleges that he was aware of this claim on the very day that it happened. He first cast this incident by reference to the previous game that was played with the Redskins early in the season in which he claims to have

played an important role and made some starring defensive plays that inhibited the Redskins' success and, indeed, the Giants won that game. And when the second game came up on December the 5th, he alleges that there was some motivation from the Redskins to get back at him, so-to-speak.

In the allegations in paragraphs 12 through 25 of the complaint, Mr. Green sets out how when this occurred, he knew immediately that he was injured. He knew immediately that a play had been made that was beyond the bounds of the NFL rules. He knew immediately that a sanction had been imposed by the referee by imposing the 15-yard penalty for the type of block that was executed by Mr. Royal. Mr. Green knew immediately that a battery had occurred. Mr. Green knew immediately that he had sustained injury as a result of that battery.

When we look at these facts through the lense of the case of *Doe versus The Archdiocese of Washington* and *Lumsden, Design Tech Builders*. Those two cases really set the limits for what this Court should consider in applying the Statute of Limitations.

Where the plaintiff knows of his injury, then the discovery rule does not apply. It is the discovery of the injury and not the discovery of all elements of the cause of action that starts the running of the clock for the Statute of Limitations.

It doesn't matter that there may have been some facts

that he did not know on that December day when he sustained his injury. It does not matter that there may be other defendants that he has yet to identify. It is only important that he was able to identify on that very day that he sustained an injury as a result of wrongful conduct by Defendant Royal.

The Court in *Lumsden versus Design Tech* goes on to say that all that is required to commence the running of the Statute of Limitations is the discovery of an injury and its general cause, not the exact cause, in fact, or the specific parties that are responsible.

So, the fact that some event occurred later or some press report occurred later that allowed Mr. Green to discover that, perhaps, Mr. Williams was involved or, perhaps, the Washington Football Club was involved doesn't matter, because the clock begins to start on his duty to investigate his own claim when he knows that an injury has occurred and a wrongful act has caused that injury.

This is not unlike -- pardon me. This is not unlike the *Doe versus Archdiocese* case. And in that case, you'll recall the young man who was, who claims that he was sexually assaulted remembered some time later in his life that this had had an impact on him.

The Court in *Archdiocese of Washington* said that this was, in fact, a battery. One knows when a battery has occurred and that there are harmful consequences. It does not matter

that you do not know the full scope of the harmful consequences. And in relation to the employer of the priest who allegedly committed these sexual assault, the Court of Special Appeals said that when these happened, there's no question that the plaintiff, Doe, knew who the priest was and knew who the priest employer was. So, to discover who the employer was at a later date really does not create a situation where the discovery rule can apply.

In the *Lumsden versus Design Tech* case, the Court of Appeals noted that once you are on notice of your cause of action, a potential plaintiff is charged with the responsibility for investigating within the three-year limitations period all potential claims and all potential defendants. Knowledge of the particular defendant is not a necessary element to trigger the running of the Statute of Limitations.

We have on that December day knowledge by the plaintiff of all of the elements of his cause of action for battery, injury and wrongful conduct. We have on that December day an event that triggered the running of the Statute of Limitations for all other defendants that may be involved in that incident and for all theories or causes of action that may have been involved in that incident, and for any additional layer of motivation that may have been involved in that incident. The clock began to run on that day for his three-year investigation period.

And that takes us into the other points that have been raised by the defendant and that -- by the plaintiff; namely, the alleged fraudulent concealment. Given the facts that have been alleged here, plaintiff's complaint makes it absolutely clear that he was aware of his cause of action the very day this incident occurred. There was no concealment. He had an injury. He was aware of wrongful conduct. And I say that because the Fraudulent Concealment Doctrine just does not apply here, because he was aware of his injury and his cause of action immediately.

Nevertheless, as the Court discussed in the *Doe* case, where fraudulent concealment is raised by the plaintiff in order to toll the running of the Statute of Limitations, the complaint must necessarily show specific allegations to show that the defendants did something to conceal that cause of action. There are no specifics alleged by the plaintiff to set forth any conduct by either of the defendants that they said something or they misled him, or they failed to disclose something.

THE COURT: Wait. I thought there was some suggestion, though, that the -- maybe it was Mr. Green's own coach who told him, no, this wasn't intentional or there wasn't -- there was some inquiry made, as I recall.

MR. FERGUSON: That was Mr. Green's own coach.

THE COURT: He said he looked at it and there was no, I don't know that anybody was contemplating a direct act by the

football, by the Washington football team. But as far as it being intentional or other than just, perhaps, a dirty play, nothing beyond that.

MR. FERGUSON: That's correct. And there was, there's no allegations that the Washington football club or Mr. Royal himself did or said anything to conceal this battery cause of action from him. And I've already said that he knew it existed that day.

In order to have the fraudulent concealment theory apply, there must have been some conduct by the defendants that caused the plaintiff to either be --

THE COURT: Well, nobody knew about this bounty system, did they? I mean, let's talk about Mr. Williams and the New Orleans Saints. I mean, nobody knew about it until years later.

MR. FERGUSON: That's correct.

THE COURT: So you're saying that he was on his own really to discover it within the three-year period. And at the same time nobody else seemed to know about it within the three-year period, he's got a special burden.

MR. FERGUSON: No, more than that. He alleges in his complaint not only that he knew he was injured and that there was wrongful conduct by Mr. Royal, but he alleges in his complaint, and he says to the New York Post the next day that he thought that this was intentional and that they were out to get

him. He had suspicions that very day or the next day that there was more to this than just an illegal block.

Now, although the NFL has investigated this and found no Bounty Program at the Washington Football Club --

THE COURT: What is the status with regard to the New Orleans situation? What about Mr. Williams and New Orleans? I'm recalling what I read in the papers, though, I don't know what the current status is.

MR. FERGUSON: I know that the NFL has imposed sanctions on --

THE COURT: Well, they made some sort of determination --

MR. FERGUSON: Yes, they did.

THE COURT: -- that in fact, Mr. Williams at New Orleans had a bounty system in place.

MR. FERGUSON: I don't really want to comment on -- I'm not involved in that.

THE COURT: I mean, if it's not a public matter, okay, but I'm just curious as to what the status was of the situation there.

MR. FERGUSON: I know that they --

THE COURT: It may bear on limitations and discovery if the rule applies, because suddenly, as I say, the NFL is coming to a conclusion about certain activity late in the game, if you will, and the argument is somehow that the individual

plaintiff should have come to that conclusion earlier.

MR. FERGUSON: Well, I do know that the NFL imposed sanctions on the coaches and the players that they claim to be involved.

THE COURT: On the team as well?

MR. FERGUSON: On the team. And that procedure is on-going as far as I know. I don't know if it has been --

THE COURT: Is Williams still in football? I have no idea.

MR. FERGUSON: Pardon me?

THE COURT: Is Williams still in football?

MR. FERGUSON: Yes, he is.

THE COURT: What is he doing?

MR. FERGUSON: He's still with the Saints.

He's with the Tennessee Titans.

THE COURT: He's what?

MR. FERGUSON: He's with the Tennessee Titans now.

THE COURT: Okay.

MR. FERGUSON: In order to avail himself of the theory of fraudulent concealment, the plaintiff also must exercise due diligence himself. He admits as much in his complaint that all he did was complain to his coach, and all he did was hope that the NFL would do something about the Washington Football Club's actions.

He made no attempt to follow up or investigate. He

even admits that there was nothing more that he could do. He could have made a formal complaint to the NFL Commissioner; he did not. He could have made a formal complaint or inquiry to the Washington Football Club; he did not. He never investigated by conducting any interviews with current or former Washington football players. He did not check with the NFL to see if there was any follow-up on their part.

So, to assert the theory of fraudulent concealment, not only are the facts absent that the Washington Football Club or Mr. Royal did anything to conceal this from him, but also he did nothing to investigate himself. And concealment really only comes into play if you do not know your cause of action exists. And it is indisputable that Mr. Green knew his cause of action existed.

THE COURT: Did he know that the Redskins were paying bounties? That again, going back to what they say is the essence of the complaint. Not that he was injured, not that even Defendant Royal may have intended to injure him, but that he was doing it pursuant to a Bounty Program.

MR. FERGUSON: Let's say for the purposes of argument, certainly, he did not know of the Bounty program. The case of *Doe versus Archdiocese of Washington*, and *Lumsden versus Design Tech Builders* say that knowledge of the particular elements is not necessary. Once on notice of one cause of action, and we know indisputably he was aware of his battery cause of action;

wrongful conduct, injury. That gives him a cause of action for battery. Once he knows of a cause of action, the plaintiff is charged with the responsibility for investigating within the three-year limitations period all potential claims and all potential defendants. Knowledge of a particular defendant is not a necessary element to trigger the running of the Statute of Limitations.

And it's also important to note, because I know that the plaintiff made the argument that he must know all of the elements of his claim, but that is not the case. In *Lumsden*, the Court of Appeals said, it is the discovery of the injury. And I direct the Court again to the day of this event. Injury caused by wrongful act. He fully knew what happened that day.

It is the discovery of the injury and not the discovery of all elements of the cause of action that starts the running of the clock for limitations purposes. All that's required to commence the running of the limitations period is the discovery of an injury and its general cause, and we know what happened that day, not the exact cause in fact or the specific parties that might be responsible.

And because of his knowledge of what occurred that day, it triggered a duty to investigate. And he through the filing of a lawsuit, the commencement of the discovery, the depositions of relevant players and former players, relevant coaches and former coaches could have gotten to the bottom of

what he alleges.

But instead, he is trying in this lawsuit to take this outside of the CBA and outside of the arbitration process that is called for by the CBA by simply alleging that a block that was a violation under the NFL rules, he is adding a layer of the bounty program over that. It's a simple allegation on his part and he should not be allowed to take it outside of the CBA and the NFL rules by that simple allegation.

He knew the day this occurred and then the next day in the paper he says that he suspected there was some ulterior motive in that block. He had the duty under Maryland law to investigate and he did not. The Statute of Limitations was triggered on the very day of --

THE COURT: Would that be true even if there was a written policy that said, you'll get bonuses for making these illegal hits? Doesn't matter? I mean, suppose there was clear evidence that there was a document that had not been discovered anywhere that clearly said that this program is designed to help you injure players. We want you to do that. Would that make any difference?

MR. FERGUSON: No, it wouldn't make any difference because the, all of the elements of the battery were present on that very day. He had the right to bring that cause of action. He had the right to invoke the full power of discovery of the NFL grievance procedure.

There is a discovery process in there. He could have interviewed. He could have conducted a real investigation and undertaken the discovery to learn that. And if there was a written policy, one would expect it be disclosed during a discovery process.

In the *Lumsden versus Design Tech Builders* case, there was a geotech -- well, there was an engineering report about the defective concrete. But once the lawsuit was filed and all this information came out, this information about the real cause of the failure of that concrete came out in discovery.

That didn't change the fact that the plaintiffs in that case knew they had been injured and allowed the Statute of Limitations to run without filing their lawsuit.

THE COURT: All right.

MR. FERGUSON: The same is so here.

THE COURT: All right. Let's hear from -- who is going to argue for plaintiff.

Mr. Miles?

MR. MILES: Again, Your Honor.

Judge, if I could, I'd like to on the Statute of Limitations argument start procedurally, because I think the procedure matters here. Whereas on the preemption claim, there is an argument that we're here on a Motion for Summary Judgment, on the Statute of Limitations claim, it's a straight Motion to Dismiss. And it's a Motion to Dismiss based on the Statute of

Limitations.

And so, I want to start talking procedurally about where we're at and where the burden lies, because in the complaint, there is no question that we have allegations of invocation of the discovery rule and allegations of fraudulent concealment.

THE COURT: Well, first question really is, I didn't hear from Mr. Ferguson is, suppose there is dispute of fact as to whether the discovery rule applies. Does that go to a jury?

MR. MILES: Absolutely.

THE COURT: Do they have to make a finding about whether he reasonably did not know at the time that he had a cause of action? I mean, I assume that defendant is arguing as a matter of law that that's so, but the other side I question is whether that should be a jury fact anyway.

MR. MILES: It positively should be, Judge. And the basis for that is a case that I believe the defendants first cited, which is *McBride*, a Court of Appeals case from Maryland. And what the *McBride* case says on page 238, and I'm quoting, the determination as to whether the plaintiff's failure to discover his cause of action was due to failure on his part to use due diligence or to the fact the defendant so concealed the wrong that plaintiff was unable to discover it by the exercise of due diligence is ordinarily a question of fact for the jury.

So, we're here on a Motion to Dismiss where there are

clear allegations, which must be taken as true in the complaint that both the discovery rule tolls the Statute of Limitations as well as the separate fraudulent concealment exception tolls the Statute of Limitations.

At this procedural posture, there is no way that a Motion to Dismiss can be granted on these particular allegations in this particular complaint.

The Statute of Limitations under Rule 8(c) of the Federal Rules of Civil Procedure is an affirmative defense. So on the defense itself, they carry the burden. Much less on a Motion to Dismiss where everything that we allege in the complaint, discovery rule and fraudulent concealment must be taken as true.

If there was any question as to who carries the burden on a Statute of Limitations defense and on this particular argument, it was answered in the *Halley Development* case, which is number one in your binder that we cited as well, which clearly notes, again quoting, the defendant has the burden of proving both discovery rule components.

So, it's an affirmative defense where they carry the burden on a Motion to Dismiss where the allegations in the complaint are presumed to be true.

Defense counsel referred repeatedly to the *Lumsden* case and it's a case that is used throughout their briefing. The *Lumsden* case says very clearly where the burden lies and how

the burden should be utilized. In the *Lumsden* case the Court says, and I'm on page 802, the defendants had the burden, the defendants had the burden of proving that more than three years before filing suit, number one, the plaintiffs knew of facts sufficient to cause a reasonable person to investigate further. And number two, a diligent investigation would have revealed that plaintiffs were victims of fraud, the alleged tort.

There is no evidence in this record, nor could there be, quite frankly, on a Motion to Dismiss that any investigation undertaken by Plaintiff Green in this case ever would have uncovered the Bounty Program, which is the gravamen of this complaint.

The defendants have not submitted any such evidence, nor could they on a Motion to Dismiss. And in fact, everything that we know from outside the four corners of the complaint is that, in fact, such a diligent investigation would not have revealed the existence of the bounty program; would not have revealed the gravamen of the complaint. And in fact, until this very day, in their pleadings they deny the existence of the program.

So, to deny -- again, on a Motion to Dismiss with the allegations in the complaint where they continue to this very moment to deny the existence of the Bounty Program and they carry the burden on an affirmative defense, it simply can't be decided with these allegations on a Motion to Dismiss.

The *Doe* case is also a case that the defense relies heavily upon. And what the *Doe* case says is quite interesting, because what *Doe* finds and I'm specifically on page 177 on *Doe* and I'm reading verbatim, "The cause of action does not accrue until all elements are present, including damages however trivial."

So, again, taking a step back and just acknowledging where we are procedurally, there is an affirmative defense alleged which they have the burden to prove on a Motion to Dismiss where the allegations in the complaint are taken as true. There are allegations in the complaint, significant allegations both to invoke the discovery rule, as well as fraudulent concealment.

There is no evidence that plaintiff was on notice of all elements in the complaint, nor could there be in a Motion to Dismiss. And there is certainly no evidence and, in fact, if anything, there is evidence to the contrary that a diligent investigation by Plaintiff Green or anyone, for that matter, would have disclosed the existence of the bounty program, which is the gravamen of this complaint.

It only became apparent and it's still not apparent in this suit, because they still deny its existence, in March of 2012, when there was an article disclosing this particular practice occurring with this particular defendant. That's when the Statute of Limitations begins to run under both the

discovery rule and the fraudulent concealment.

So, Judge, I don't mean to be overly brief and I'm certainly happy to answer any questions, but --

THE COURT: Well, there is an Alternative Motion for Summary Judgment here as well.

MR. MILES: On the preemption?

THE COURT: Am I wrong? Is there not a Summary Judgment Motion that goes to the limitations argument?

MR. FERGUSON: Yes, Judge.

MR. MILES: Judge, if there is an allegation -- if there is a claim that the Motion for Summary Judgment applies to the Statute of Limitations as well under the case law I cited with respect to it being a question of fact, clearly there is no evidence they have submitted to this Court that in any way, shape or form says all the elements were met and that a diligent investigation --

THE COURT: We need to parse this further though. He cited a case or Mr. Ferguson cited a case that says, once you know of your injury, which he did as of that day and he suspected it was done intentionally, he had a duty to investigate and he didn't investigate. And he says, therefore, as a matter of law, leave aside Motion to Dismiss at this point, he should prevail.

Now, maybe the argument that you make is the same, but you need to address a different standard really when you're

talking about Summary Judgment.

MR. MILES: Correct. And, Judge, what that case says, which he cited which is the *Lumsden* case, is that they have the burden of not just showing that there could have been an investigation or that more could have been done, but rather that a diligent investigation would have revealed that the plaintiff was the victim of a tort.

And there is no evidence in this record that any diligent investigation -- in fact, there's no evidence at all on the Statute of Limitations, but there is certainly no evidence in this record that a diligent investigation would have revealed the existence of the Bounty Program.

THE COURT: Yeah, but -- well, but go to the -- they're also arguing about the duty, that there was no additional element that needed to be known about. That the bounty system, in effect, doesn't really add to what your knowledge should have been. Whether you knew about the bounty system or not, all the other key elements of the tort were known as of December 2004, was it? That's the argument that he makes, that the legal analysis was there. And the fact that there may be another defendant or ulterior reason that you don't know about really doesn't matter, because everything that you -- that should have put you -- everything that you had was then and there done.

MR. MILES: And, Judge, this harkens back to your

hypothetical to me during the preemption argument, which is, well, if the allegation was simply that Defendant Royal intentionally injured the plaintiff, and we were talking about preemption then, would that be a different allegation in degree and kind for purposes of preemption? And I answered, no, because it's our position intentional torts are outside of the CBA.

But it would be a different argument for purposes of the Statute of Limitations. And the reason why is this is a different complaint than a complaint that argued or alleged that Defendant Royal with malice of forethought attempted to injure the plaintiff during a football game December, 2004. If that were the allegation, if that were the cause of action, then I would agree that under the defendant's case law, the Statute of Limitations began in September, 2004.

But this complaint is based upon the Bounty Program and the allegation that the Bounty Program did not come to light in any way, shape --

THE COURT: Well, articulate for me the legal standard that gives you a right to sue because of the Bounty Program. What is the legal theory of liability?

MR. MILES: For both --

THE COURT: For suing the Washington Football Club because of the existence of the Bounty Program. How does it exist independently of Mr. Royal committing a tort of

battery?

MR. MILES: Because with respect to the Washington Football Club, there are specific allegations both of direct and active negligence stemming from the Bounty Program that would not exist, would not exist in the instance of Defendant Royal simply going rogue and intentionally injuring Plaintiff Green.

THE COURT: Why is it articulated as negligence rather than as intentional tort?

MR. MILES: I believe it's articulated in the complaint as both. And the act of negligence --

THE COURT: The battery is, that's right, vicarious liability, but then you have two counts of negligence and negligent supervision. I gather negligent supervision is attended if Williams did it on his own, the football coach should have known.

MR. MILES: Correct. And the negligent supervision which is a count that we have not even discussed, clearly there are elements within that that did not come to light by any way, shape or form under anyone's calculation until March of 2012. But the act of negligence claims against the defendant football team are based entirely upon their supervision, acceptance and promulgating of the Bounty Program leading to the hit by Defendant Royal.

So, essentially, the Defendant Royal is the instrumentality of the defendant football team's negligence.

And that cause of action based on that theory with those elements simply did not exist until March of 2012.

And even if you were to go back in time and argue, as they have, that in December of 2004, the plaintiff should have been on notice and should have undergone a diligent investigation, you still have the burden as the defendant asserting an affirmative defense to prove that, A, that diligent investigation could have been undertaken; and, B, that had that diligent investigation been undertaken, it would have, in fact, disclosed the existence of this particular tort. They don't have evidence, certainly not at this stage, to meet this burden.

THE COURT: I'm trying to get you to articulate the theory of liability. One, the immediate liability of someone is, you shall not commit a battery against someone else. And the way I'm trying to understand the tort you're alleging against the football club is, you shall not have a policy that someone should go out and deliberately commit a tort against another person.

MR. MILES: Correct.

THE COURT: Is there such a thing?

MR. MILES: Yes.

THE COURT: And does that exist -- would that be within the normal period of limitations ordinarily? Leave aside the Bounty Program that comes to light whatever it is, 12 or eight years later. If you discover that somebody had

deliberately, by a written contract, let's say it's clear evidence put somebody up to do a hit job or something, whatever it might be, but you know that you've been murdered or you know that you've been wounded in a three-year period and it's pursuant to a contract for hire, whatever it is, hired gun.

MR. MILES: Correct.

THE COURT: Is that a separate theory or is it all part of a theory?

MR. MILES: It's a separate theory. And here's perhaps the clearest way I can explain it. An employer would not have vicarious liability, would not have responsibility, typically for an employee who went and committed an intentional sort or a crime for that matter.

The way that the defendant football team or any employer becomes responsible for those actions is if they condone them, if they are a party to them, if they have active negligence in -- with respect to that particular claim.

So, intentional injury with malice of forethought by Defendant Royal acting rogue separate and apart from a bounty program or anything else, traditional, civil causes of action no vicarious liability for the employer.

THE COURT: Unless it's in the scope of his employment, I'm not really sure that's true, what you just said.

MR. MILES: Within the scope of employment, I think most or certainly some courts would hold an intentional tort

would always be outside the scope and course of the employment. But what makes this allegation different in kind and in degree, what makes the cause of action different is we allege the Bounty Program, which creates -- not just condoning, not just condoning of the hit itself, but in fact a policy and procedure that pre-existed the hit.

THE COURT: That's what I'm asking you. Why is that negligence? Why isn't that in itself a direct intentional tort by the football club?

MR. MILES: It probably is both.

THE COURT: I don't see it pled that way is what I'm saying. I see a vicarious liability claim as to Royal, but that depends on his liability. There's nothing that says directly, you formulated this policy as a direct result of which I was injured.

MR. MILES: In Count Two, which we've titled Vicarious Liability, and I'm looking at paragraph 58 and 59. We discuss the defendant football team through their supervisory coaching staff maintained a Bounty Program in which players were encouraged and even compensated for playing outside the rules of the game and for intentionally injuring other players.

Next paragraph, that this conduct was institutionalized within the defendant football team and the defendant football team were complicit in the battery and injury of Defendant Green. That's a direct act of negligence claim

against the defendant football team for their creation, condoning and ratifying this policy of --

THE COURT: You keep talking language of negligence against the football team, but you're talking language of intent when you talk about what they did.

MR. MILES: And it's both. We've argued both negligence, and I believe in Count Two vicarious liability --

THE COURT: Maybe you've really put two causes of action in there. One is for vicarious liability as to what Royal did and the other is their own intentional tort, as you articulate it, I think, in creating a Bounty Program.

MR. MILES: Correct, which I've articulated as active negligence. But, yes, it is something separate and apart from the strict vicarious liability an employer would typically have for an employee operating within the course and scope of --

THE COURT: Sounds like an intentional tort to me, but that's what I'm having some, at least, conceptual difficulty understanding. And you may have folded it both into Count Two. The allegation certainly seems to be there, that it was an intentional program to cause this injury. And then it also was because Royal allegedly did certain things, the football club is vicariously liable for what he did.

MR. MILES: I think that's fair. I think Count Two could be broken into two separate counts in exactly that manner.

THE COURT: Okay.

MR. MILES: Just in conclusion, there are six or, I believe seven, again, specific paragraphs in the complaint which lay out the fraudulent concealment exception to the normal Statute of Limitations.

Those disclose the fraud that occurred, the identity of the person committing the fraud and the reliance upon the fraud. So, if we're on a Motion to Dismiss, allegations taken as true. If we're on a Summary Judgment, there is no evidence submitted by the defendants that contradicts those allegations. Certainly not that would allow this Court to grant Summary Judgment on it.

So, for two separate bases, based on the allegations in the complaint and the dearth of the evidence submitted by the defendants who have the burden of proving the Statute of Limitations defense, we believe that motion should be denied as well.

Thank you.

THE COURT: All right. Mr. Ferguson.

MR. FERGUSON: Thank you, Your Honor.

Let me clear up a couple of things. The complaint sets forth a claim against Mr. Royal for battery and a claim against the Washington Football Club for negligence and negligent supervision. Our filings included a Motion to Dismiss, or in the alternative for Summary Judgment.

The alternative for Summary Judgment was because we

added to the court file and the pleadings the provisions of the Collective Bargaining Agreement. It is our position that on its face, the four corners of the complaint set forth facts, which if taken as true dispose of the plaintiff's claim on the Statute of Limitations, and dispose of every cause of action of the plaintiff against these defendants because of the Statute of Limitations. There's enough information within the four corners of the complaint for the Court to rule on that as a matter of law.

Counsel has suggested to the Court that the rule to be applied is that the plaintiff must know and be on notice of every element of his cause of action in order for the Statute of Limitations to be triggered. That is not the standard in Maryland.

That language was taken out of *Doe versus The Archdiocese of Washington*. And the Court did say that all of the elements of the cause of action must be present, not that the plaintiff must be on notice. And I'll get to the on notice in a moment, because the Court of Appeals addressed that specifically in *Lumsden versus Design Tech Builders*.

But in *Doe versus Archdiocese of Washington*, the Court was talking about a battery. And it recognized that factually if there was an impermissible touching of the plaintiff and he was injured by it, that all of the elements were present.

Here in this case of Mr. Green, there was wrongful

conduct, as he has alleged in his complaint; namely, the crack back, the crack block and an injury which he says occurred that very day. All of the elements of his cause of action of battery were present that day. And once that occurred, and I'm quoting from *Doe versus Archdiocese* at page 188, 189, once on notice of one cause of action, a potential plaintiff is charged with responsibility for investigating within the limitation period all potential claims and all potential defendants."

THE COURT: This is Maryland Court of Appeals speaking?

MR. FERGUSON: This is the Court of Special Appeals.

THE COURT: Okay.

MR. FERGUSON: Knowledge of the identity of particular defendant is not a necessary element to trigger the running of the Statute of Limitations. And then our Court of Appeals in *Lumsden versus Design Tech Builders* quoted a passage at page 450. "It is the discovery of the injury and not the discovery of all of the elements of the cause of action."

So quite clearly, our Court of Appeals is saying, you don't need to know all of the elements of the cause of action. You need to discover that you were injured. It is the discovery of the injury and not the discovery of all of the elements of the cause of action that starts the running of the clock for limitations period. That is when the limitations period started for Mr. Green, the day of his injury. He knew of his injury, he

knew of the wrongful conduct. All of the elements were present.

THE COURT: What about these asbestos cases where the causation is determined years later? People develop some sort of lung problems and it isn't until considerable period of time after limitations that they realize it's some sort of working condition that caused it. Are they subject to the three year period limitation?

MR. FERGUSON: They're not, because they don't know they've been injured.

THE COURT: No, they may well know that they've been injured. They don't know how. Maybe there is an aspect of what you just said being so, but they also don't necessarily know what the cause was, do they?

MR. FERGUSON: Well, you bring up an interesting point, because my understanding of the asbestos cases is they do not know they have been injured until some symptoms begin to occur and then they discover what the injury is.

Lumsden versus Design Tech Builders is the other situation you're talking about. They know they're injured, but don't know why. In *Lumsden versus Design Tech*, they knew that the concrete was failing. And at first, they thought it was because of the salt and chemical products that were put on their by the landscaping company.

But later, they learned that there was a flaw in the concrete itself used by the developer, *Design Tech Builders*.

And the Court of Appeals says, it does not matter. It's the discovery of the injury that triggers the cause of action. So, although they knew their concrete was failing and didn't discover why until some time later, that did not stop the running of the Statute of Limitations.

It's not cited in our briefs. It may be cited in some of the cases, but this is an interesting case involving the Sisters of Mercy in Baltimore. They had a retirement home constructed and their roof leaked. And they called in contractor after contractor to try and fix it. They knew their roof leaked. It wasn't until five years or so later that they discovered that it was design by the architect that caused that problem. And suit was filed and it was barred by the Statute of Limitations because the cause of action against the architect who had the poor design began to run when they first noticed the roof was leaking, not when they noticed that there was a design flaw.

Lumsden versus Design Tech makes it quite clear that it is the discovery that you are injured that triggers the cause of action, not the discovery of all of the element of the cause of action or the particular cause.

THE COURT: Regardless, for example, of how extreme the concealment of liability might, potential liability might have been by the perpetrator. In other words, you know, it's known that somebody gave rise to this particular injury, but the

fact of it is so beyond the realm of ordinary investigation that you don't discover it until after limitation, ordinary limitations. Doesn't matter, you say?

MR. FERGUSON: It doesn't matter, not in the facts of this case, because let's take *Lumsden versus Design Tech*. They knew there was a failure of the concrete. They just didn't know why. The builder in that case didn't do anything to cause this to be concealed. They knew this concrete was failing. That's what triggers the running of the Statute of Limitations.

In this instance, Mr. Green knew on the very day of this game that he had sustained an injury. That triggered the running of the Statute of Limitation as to all causes of action, as to all defendants and to all elements of those causes of action.

THE COURT: All right. Let me go back for a minute to an analysis that I'm trying to get my hands around and I asked at one point whether there's a difference between Royal's liability potentially on these issues and the football club's liability. And that's why I'm looking at whether there is an independent cause of action against the football club, not for vicarious liability for an intentional tort by Royal, but for formulating a Bounty Program that sought to injure opposing players.

That's the core allegation that's being argued, but it's not set out as a distinctive cause of action. There's

reference to it in various paragraphs, that if you start with the Royal situation, everything that Mr. Ferguson says is true. The plaintiff is injured on that day. He knows he's been injured. He knows he's been injured deliberately. And essentially, suit is filed against Royal, I guess, for that and then by his employer, the football club, for allowing him being vicariously liable for letting him do that.

That cause of action may have existed within the three-year period, but it may be gone. The cause of action that may really be at the heart of the case is the one that I kept asking you, Mr. Miles, articulate the separate cause of action; which is, can someone in effect put out a contract to injure somebody else or whatever it is that's essentially -- maybe that's what it's like, a contract for hire. Is that a separate cause of action? Is that one that we're really talking about where the discovery rule applies as opposed to simply an intentional illegal hit back in 2004, because we may be talking past each other than this in terms of where we are.

MR. FERGUSON: Fortunately, our Court of Appeals has addressed that very question.

THE COURT: They have. Well, I'm amazed. Go ahead.

MR. FERGUSON: Let assume for the purposes of this argument that Mr. Green's claim against Mr. Royal for the battery that occurred that day is one cause of action. And then the -- some cause of action based on the Bounty Program against

the Washington Football Club is a separate cause of action, and he discovers it sometime later.

Court of Appeals in *Lumsden versus Design Tech* at page 450, it's the discovery of the injury, not the discovery of all of the elements of the cause of action that starts the running of the clock for limitations purposes. And they go on. Here, all that is required to commence the running of the limitations period is the discovery of an injury, and its general cause, not the exact cause, in fact, and the specific parties responsible.

So I mean, they did recognize, you know there's an injury. There may be other elements of what caused it or may be other parties that caused this injury, but once you're on notice, once it's triggered, the clock is running and you're off to the races to discover everything else. It is the responsibility of the plaintiff to investigate within the limitations period all potential claims and all potential defendants with regard to the injury.

THE COURT: Well, that may be -- that's Court of Special Appeals or Court of Appeals?

MR. FERGUSON: First quote was from the Court of Appeals. The last one was from the Court of Special Appeals.

THE COURT: Well, Mr. Miles, I want to you to address this. You don't necessarily have to come up with a final statement on this today, but you see my dilemma. As I understand one cause of action for against battery against Royal

and vicarious liability for the battery, that can exist independently of a Bounty Program. Maybe or maybe not, but at least there's a theoretical cause of action there.

But the Bounty Program is the gravamen and, perhaps, it does need to stand out as a separate cause of action and whether given the language that Mr. Ferguson has cited, you can get past that obstacle.

And again, this is Court of Appeals, which sometimes goes overboard, candidly, when they don't have all the facts. That's why we deal from case to case here rather than these broad statements that forever guide us, but at least it's along lines of your argument.

And I think we need to look at this sort of separate contract for hire, if you would. Don't want to be too invidious about this, but you see the analogy. It's different from simply vicarious liability for an employee's tort.

MR. MILES: Judge, if I can address that and I'm happy to do it from here.

THE COURT: All right.

MR. MILES: Judge, that count exist in the complaint under Count Four. Count Four, which begins at page 12 of our complaint, the negligence count directly against the defendant football team. And if you go to page 14 of that count of the complaint at actually paragraph 80, paragraph 80 reads that defendant football team breached its duty to plaintiff by

allowing the aforementioned Bounty Program to develop and flourish. This negligence, gross negligence and maliciousness resulted in Defendant Royal injuring the plaintiff. And then it continues to go on and explain exactly why --

THE COURT: It still doesn't talk about intentional. It's negligent, gross negligent and malicious. Maybe when you talk about malice, you're talking about intentional, but it fuses the --

I mean, the question is, what's the standard here anyway? If you try this cause of action, what are you saying? That it varies from -- if you start with a negligence concept, it varies from a standard of care or with regard to ordinary and -- standard of care or it's way beyond that in the sense that you actually formulated the policy.

I mean, that's what you're saying here, that the Red -- no, let me be careful about that. That the football club deliberately formulated a policy to injure your client. That's what you're saying.

MR. MILES: Correct. And, Judge, I believe that this particular count, obviously, negligence is straight negligence. Again, I'm reading from paragraph 80. As we go on the spectrum of mens rea, gross negligence becomes further along the spectrum towards an intentional tort. Maliciousness would be further along that spectrum. Maliciousness would pre-suppose malice, which would pre-suppose intent to injury. So this particular

count does, in fact, have I believe that intentional tort pled within it.

THE COURT: Well, candidly, what it really ought to say -- there ought to be separate causes of action. One could be for, if you say, straight negligence. I'm not sure that would past muster when we got to a discussion of the merits if it survives the preemption argument and so on. Gross negligence is another standard. Intentional tort is another standard. Now, you fused all three of them, I think, into this one count.

MR. MILES: Correct.

THE COURT: And as I say, as the case might get tried, it goes to the jury with different instructions, and not just as a single count. You don't say, how do you find on Count Four and then put three different possibilities within it. You need to think about how a case gets tried.

Anyway, that may be something that we're going to have to sort out over time.

MR. MILES: Sure. And we can certainly amend to add separate counts.

THE COURT: All right. Anyway, the issue that you're still faced with, I think, is this argument and maybe we can wind up on this point, that even if there is a separate cause of action for the intentional formulation of a contract to injure somebody in your line of business, is there, is that subsumed in the argument that Mr. Ferguson makes that you still have -- once

you know your injury, you got to know all these potential contributors or is there something unique and different about that that would put the discovery rule in play.

MR. MILES: Well, two explanations, Judge. First of all, I think there is something unique and different about that. I mean, the fact of the matter is, particularly, with respect to the defendant football team, no facts of that particular cause of action were known until March of 2012. There was absolutely nothing known about the Bounty Program, how it operated, whether it operated at the defendant's football team; who ran it, how they ran it, why they ran it?

None of those facts existed and plaintiff cannot be charged with notice of any of those facts until such time as the article gets published in March of 2012. That in and of itself, I think, is sufficient to deny the motion.

The second point I would make is defense counsel continues to refer to one part of the discovery rule burden that defense has in order to show that the Statute of Limitations applies, but not the second part. And I'm reading a different quote here from *Lumsden*, which is a case that they heavily rely upon obviously. "A claimant reasonably should know of a wrong if the claimant has knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry with notice of all facts, pause."

That's the part they keep arguing. They keep saying,

in 2004 when the hit occurred, the plaintiff was on knowledge, on notice of the existence of all the facts. But the test continues and their burden continues.

And what it says is, continuing on, "Which such an investigation would in all probability have disclosed if it had been reasonably pursued." That second part of the test, they simply can't meet on a Motion to Dismiss, which I'm still unclear if we're on that or on a Motion for Summary Judgment.

A Motion for Summary Judgment or anything else, there is no claim in this case, nor could there be, because they continue -- remember, Statute of Limitations, affirmative defense, a plea of avoidance. There is no claim in this case that the plaintiff could have, could have discovered the existence of the Bounty Program more than three years prior to filing his complaint if he had diligently pursued it in some way that they believe he did not. That doesn't exist.

THE COURT: All right. Final word.

MR. FERGUSON: It doesn't matter that they did not know who did it or who, who else might be responsible. Our Court of Appeals has quoted with approval from *The Archdiocese of Washington* case, once on notice of one cause of action, a potential plaintiff is charged with responsibility for investigating within the limitations period all potential claims and all potential defendants with regard to the injury.

And it goes on to say at page 451, limitations begins

to run when the fact of the injury in known, not when alleged wrongdoers are identified. And there is no dispute within the four corners of this complaint the fact of the injury was known on the day of this football game. The Statute of Limitations was triggered.

All these other cases that talk about other elements or other investigations are cases where the complexity of the injury is such that you don't know what the injury is or that you have been injured.

Just like *The Sisters of Mercy*, when the first leak occurred, they knew they had an injury. It's just too bad that it took them five years to discover that it was the architect, not the contractor; that it was a poor design, not a poor installation.

THE COURT: All right.

MR. FERGUSON: Thank you, Your Honor.

THE COURT: Let me pose this to you. I'm going to write an opinion in this case, so I won't give you an oral opinion at this point. But I want to invite the parties and I'll give plaintiff two weeks to -- well, let's see. We're in December almost already. Bit of a short fuse, but by the end of December, I would say. If you want to look at this issue of a separate cause of action for a party which deliberately engages another party to cause physical injury to a client, what kind of case that is in terms of the elements and whether there is a

discovery-type issue involved there where the contract, if you will, only comes to light beyond the ordinary limitations period.

Assuming that there's an injury that occurs as an ordinary injury would for the three-year period, I think you need to look at that and see whether that particular cause of action separately stated has a different character. And then I'll give the defendant, if you want, 30 days to respond in terms of any write-up.

MR. MILES: Would you like this in a supplemental briefing?

THE COURT: I think you should do it as a supplemental brief. I mean, I think -- look at that issue. It's really something more I thought about as I looked at your papers and I didn't do any independent research on it myself. Believing in the adversarial system, I'd like you to do it and I'll see what I can supplement, but let's do it that way and see where we are.

And it will take a while to get this opinion written anyway, and I don't think we're going anywhere in this case. It's all sort of, I think, established already. Nobody needs to get an answer by the end of next month, but we will write an opinion, I think. It's an important issue. There's some interesting issues to deal with here.

MR. MILES: And just in terms of deadline, do you want us to --

THE COURT: Well, can you do it by end of December?

MR. MILES: Sure.

THE COURT: I mean, there's a holiday in between, but do the best you can, two holidays.

MR. MILES: Not a problem.

THE COURT: And then if defendants can respond within 30 days. And then you can have 15 days to reply. If you need more time, let me know. I mean, this is not necessarily the front burner opinion. I've got some other opinions I'm working on now that will have to take priority.

But that said, interesting argument and we shall have something to say about it soon enough.

MR. MILES: Thank you, Judge.

THE COURT: All right. Thank you very much, counsel. Have a nice holiday.

(Recess at 12:15 p.m.)

CERTIFICATE OF COURT REPORTER

I, Linda C. Marshall, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____
Linda C. Marshall, RPR
Official Court Reporter

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properly [3] 20/13 20/16 38/14
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provide [3] 11/16 29/6 32/15
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